The evidence is that the gunman ran one way and the two accused in another, and there is a conflict of evidence as to whether one of the accused ran at all. (No. 2 accused's evidence is that he did not run away and that he was arrested inside the house). The fact of flight at the approach of the police by uneducated people of this calibre in this country is far from being a conclusive or even a probable indication that the people who run have guilty knowledge or intention. In my view, unless the only reasonable presumption from the circumstances is that of intended or actual participation in an act prejudicial to public safety, the accused are entitled to the benefit of any other reasonable presumption indicating innocence.

I cannot say that the flight from the house has only one reasonable explanation, nor is there any proof of any intended or imminent or past act by the accused prejudicial to public safety or the maintenance of public order, and I therefore acquit the accused.

Accused acquitted.

CHAN SAU CHOON (f) v. FOONG SEONG.

[C. A. (Willan C.J., Spenser Wilkinson and Russell JJ.) October 30, 1948]

[K. L. — F.M. Civil Appeal No. 2 of 1948]

Practice — Civil Procedure Code (Cap. 7), s. 597 — 1935 Rule No. 1, sub-rr. 15 and 16(ii) — Appeal dismissed where appellant is not present — Application for re-instatement of appeal.

In this case the appellant was not present in person or by advocate at the adjourned hearing of the appeal and the Court of Appeal acting under 1935 Rule No. 1 sub-r. 15 dismissed the appeal. The appellant applied to the Court that the appeal be re-instated for hearing.

Held: (1) the Court has no power to re-instate for hearing an appeal which had been dismissed under 1935 Rule No. 1 sub-r. 15; (2) that even if the Court had the power, it would not exercise it in this case, as the appellant had on the facts no merits in her favour.

Cases referred to:—

(1) *Sabitri Thakurain v. Savi* 48 I.A. 76 at p 85.

(2) *Magnus Spanier v. Marchant* (1878) W.N. 214.

MOTION.

M. Edgar for the appellant.

J. M. Lewis for the respondent.

Willan C.J. (with whom **Spenser Wilkinson** and **Russell JJ.** agreed): — This was a motion by the appellant (plaintiff at the original trial) that the order of the Court of Appeal made on the 6th of July, 1948, dismissing the appeal for the non-appearance of the appellant, when the appeal was called on for hearing, be set aside, and that the appeal be re-instated for hearing.

The motion contained other prayers, but Mr. Edgar, counsel for the appellant, abandoned them on the hearing of the motion.

The history of the appeal is set out in the Grounds of Judgment of the Court of Appeal dated the 30th of July, 1948. Briefly, the history is as follows.

This appeal first came before the Court of Appeal at its sittings in Ipoh on the 21st of June, 1948. The appellant, though represented by two counsel at the original trial, did not engage counsel to conduct her appeal. When the appeal was called on for hearing on the 21st of June, 1948, the appellant was absent. She had written two letters applying for an adjournment to the next sittings of the Court of Appeal. (Those sittings were listed to commence at Kuala Lumpur on the 5th of July, 1948). The first letter is dated the 19th of June, 1948, and is addressed to the Assistant Registrar, Supreme Court; it has a document attached to it purporting to be a medical certificate by a doctor. The second letter is dated the 21st of June, 1948, and is addressed direct to the Judges of the Court of Appeal. It also has a document attached to it purporting to be a medical certificate by another doctor. The Court of Appeal at Ipoh, although the application for an adjournment was not made in accordance with sub rule 4(i) of 1935 Rule No. 1 (which states that all applications to the Court of Appeal shall be made by Notice of Motion), and although the said documents had not been proved, granted the appellant's application for an adjournment and postponed the hearing of the appeal to the next sittings of the Court of Appeal commencing at Kuala Lumpur on the 5th of July, 1948. This appeal having been listed for hearing at Kuala Lumpur on the 5th of July 1948, the appellant, on the 28th of June, 1948, wrote another letter addressed to the Assistant Registrar, Supreme Court, stating that she came out of hospital on 26th June, 1948, and now required another adjournment so as to engage counsel. She followed up that letter with a still further letter dated the 2nd of July, 1948, addressed to the Registrar, Supreme Court, applying for this further adjournment, but this time on the ground that she was ill and had gone back to hospital. Attached to this letter there were two documents purporting to be medical certificates by two doctors. On 6th July, 1948, this appeal was called on for hearing in the presence of two counsel for the respondent. No counsel appeared for the appellant nor did she, herself, appear.

The Court of Appeal on the 6th of July, 1948 dismissed the appeal for default on the part of the appellant under sub-rule 15 of 1935 Rule No. 1. That sub-rule so far as it is relevant, is as follows:—

If on the day fixed for hearing the appeal or any other day subsequent thereto to which the hearing of the appeal may be adjourned the appellant shall not appear in person or by an advocate and it shall not appear to the Court of Appeal that there is any reasonable ground for such absence the appeal shall be dismissed for default . . . . .

The reasons for dismissing the appeal, recorded in the Grounds of Judgment of the earlier Court of Appeal, are that that Court doubted the *bona fide* intention of the appellant to prosecute her appeal.

Mr. Edgar founded his application for the re-instatement of the appeal for hearing upon an alleged inherent jurisdiction of the Court and relied on section 597 of the Federated Malay States Civil Procedure Code as showing that such jurisdiction exists. That section is as follows :—

Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

It is identical with section 151 of the Indian Civil Procedure Code, and Mr. Edgar referred us to several Indian decided cases and to commentaries on that section in Indian text-books.

Section 151 of the Indian Civil Procedure Code has been described by Their Lordships of the Privy Council as "a mere general saving clause" — see *Sabitri Thakurain v. Savi*[1].

Applying that description to section 597 of our local Civil Procedure Code, it is clear from its language that it is a mere general saving clause limited to the Code itself. It does not relate to any provision of law outside the Code. This is important, because, in India, rules regulating procedure are made under section 121 of the Indian Civil Procedure Code, and that section specifically states that such rules "shall have effect as if enacted in the body of the Code". Therefore section 151 of the Indian Civil Procedure Code relates to rules made under the Code to the same extent as it relates to the Code itself.

The position here is different from that in India, because our local 1935 Rule No. 1, regulating the procedure in the Court of Appeal, is not made under our local Civil Procedure Code but under the Federated Malay States Rule Committee (Supreme Court) Enactment, 1930, now replaced by the Malayan Union Rule Committee (Supreme Court) Ordinance, 1947. Therefore section 597 of our local Civil Procedure Code has no application to 1935 Rule No. 1, which is the rule under which the appellant's appeal was dismissed for non-prosecution by her.

1935 Rule No. 1 contains no provision whereby an appeal, which had been dismissed by the Court of Appeal under sub-rule 15 thereof, may be re-instated for hearing. That being so, section 16(ii) of the Federated Malay States Courts Enactment (Cap. 2) applies. It reads :—

In any case not provided for by this Enactment or by rules in force thereunder the practice and procedure for the time being of the Court of Appeal in England shall be followed as nearly as may be.

That sub-section refers to rules made under the Courts Enactment. The reason for this is that prior to 1930 all rules relating to practice and procedure in the Supreme Court, which includes the Court of Appeal, were made under the Courts Enactment. But in 1930 the Rule Committee (Supreme Court) Enactment (Cap. 13) was enacted which vests in the Rule Committee power, *inter alia,* to regulate the practice and procedure to be followed in the Court of Appeal. Although sub-section (ii) of section 16 of the Courts Enactment was never amended to make it specifically applicable to rules made under the Rule Committee (Supreme Court) Enactment, its clear intention is that the practice and procedure of the Court of Appeal in England is to be followed where there is no provision in the Courts Enactment or in the Rules of Court to meet the necessities of any particular case.

Therefore it is to the practice and procedure of the Court of Appeal in England, and not to the Indian authorities, that one should turn for guidance.

In England the practice in the Court of Appeal, when an appeal is called on for hearing and the appellant does not appear, is that the appeal is dismissed — see *Magnus Spanier v. Marchant*[2]

I have been unable to find for myself, nor could counsel for the appellant cite, any decided English case where the Court of Appeal in England has re-instated for hearing an appeal dismissed under those circumstances. In the absence of any such authority I am not prepared to hold that this Court has power to re-instate, for hearing, this appeal, in which the order of the earlier Court of Appeal has been drawn up.

I might add, that even if such power did exist I would not have been prepared to exercise it in favour of the appellant because she had no merits in her favour. The earlier Court of Appeal had all the facts before it, which were placed before this Court of Appeal, except an additional medical certificate dated the 14th of July, 1948. In my opinion, the additional medical certificate, if it had been produced on the 6th of July, 1948, would have made no difference to the decision of that earlier Court of Appeal.

For these reasons this motion was dismissed with costs.

Motion dismissed.